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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 253

[Docket No. 170404355-8455-02]

RIN 0648-BG80

Merchant Marine Act and Magnuson-Stevens Act Provisions; Fishing Vessel, Fishing Facility and Individual Fishing Quota and Harvesting Rights Lending Program Regulations

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce

ACTION: Final rule; response to comments.

SUMMARY: NMFS' Fisheries Finance Program (FFP) provides long-term financing to the commercial fishing and aquaculture industries for fishing vessels, fisheries facilities, aquaculture facilities, and certain designated individual fishing quota (IFQ). Section 302 of the Coast Guard Authorization Act of 2015 included new authority to finance the purchase of harvesting rights in a fishery that is federally managed under a limited access system. Through this final rule, the FFP adds a new section to the existing FFP regulations to implement this statutory change. The net effect of this change to the regulations will be to provide additional authority for the program to lend, and providing FFP financing to additional fisheries while leaving the original IFQ authority to Fishery Management Councils to use as needed.

DATES: This final rule is effective [*insert date 30 days after date of publication in the FEDERAL REGISTER.*]

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SUPPLEMENTARY INFORMATION: Under the authority of Chapter 537 of Title 46 of the United States Code, 46 U.S.C. 53701, *et seq.*, the FFP may provide long-term financing to the commercial fishing and aquaculture industries for fishing vessels, fisheries facilities, aquaculture facilities, and certain designated individual fishing quota (IFQs). Section 302 of the Coast Guard Authorization Act of 2015 (Pub. L. 114-120) amended Chapter 537, providing the FFP with the authority to finance the purchase of harvesting rights in a fishery that is federally managed under a limited access system. This amendment is codified at 46 U.S.C. 53702(b)(4)(B). On October 31, 2017, NMFS published a proposed rule to add a new section to the existing FFP regulations to implement this statutory change and requested public comment (82 FR 50363). NMFS received eight responses, of which two were not related to the rulemaking five were in support and one was neutral. The net effect of this final rule is to provide additional authority for the program to lend, while leaving the original IFQ authority to Fishery Management Councils (FMCs) to use as needed.

Existing IFQ Loan Authority

46 U.S.C. 53706 authorizes the FFP to finance or refinance the purchase of individual fishing quotas in accordance with section 303(d)(4) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), now codified at 16 U.S.C. 1853a(g). Under this provision of the MSA, an FMC may submit, and NMFS may approve and implement, a loan program to aid in (1) the acquisition of IFQ by fishermen who fish from “small vessels,” and (2) the first time purchase of IFQ by “entry level fishermen.” Therefore, under this authority, the

FFP cannot initiate or implement a lending program to finance or refinance the purchase of IFQ until the appropriate FMC submits a request to NMFS and provides guidance for the requisite criteria.

NMFS currently administers two loan programs pursuant to the existing IFQ authority: the Northwest Halibut/Sablefish and Bering Sea and Aleutian Islands Crab IFQ loan programs. NMFS anticipates no changes to either of these existing loan programs as a result of this action. However, the availability of the new loan authority may affect fishers in the existing IFQ loan programs by providing an additional source of financing which would not be limited by existing quota share ownership.

New Loan Authority

The new authority provided by Pub. L. 114-120 broadens the FFP's existing authority, and authorizes the Program to finance the purchase of harvesting rights in a fishery that is federally managed under a limited access system. NMFS interprets "limited access system" in accordance with section 3(27) of the MSA for purposes of this authority. The MSA defines "limited access system" as "a system that limits participation in a fishery to those satisfying certain eligibility criteria or requirements contained in a fishery management plan or associated regulation." 16 U.S.C. 1802(27). Such definition includes, but is not limited to, IFQ fisheries.

The new authority provided by Pub. L. 114-120 does not require FMCs to initiate a request to establish a loan program in a fishery that is federally managed under a limited access system in order for the FFP to provide financing in such a fishery. However, under the MSA, FMCs are primarily responsible for developing fishery management plans (FMPs) for fisheries within their authority that require conservation and management. It is possible that the

availability of fisheries loans may have unanticipated effects on the achievement of FMP goals and objectives. Therefore, NMFS believes it appropriate to allow the FMCs to comment on the potential or actual effect of a loan program for harvesting rights in fisheries under their authority. An FMC may provide an explanation to NMFS at any time, in writing, why the potential or continuing availability of financing for harvesting rights in a fishery under its authority would harm the achievement of the goals and objectives of the FMP applicable to the fishery. If NMFS accepts the Council's reasoning, harvesting rights loans would not be provided, or would cease to be provided, in that fishery. In such a scenario, NMFS would publish a notice in the *Federal Register* notifying the public that new loans will not be made in that fishery. If there were already loan applications under consideration, the exceptional circumstances would justify NMFS returning any loan fees submitted with loan applications. The opportunity for FMC input will help ensure that loans made by the FFP do not undermine or conflict with the goals and objectives of specific FMPs.

Extent of Financing

Section 302 of the Coast Guard Authorization Act of 2015 imposes no limitations on the extent of financing to be provided by the FFP for the purchase of harvesting rights. The new authority is also silent on any other limitations, such as those in the existing IFQ loan programs limiting quantities of quota share eligible for financing. However, it does reserve \$59 million of direct loan authority for historical uses, defined at 46 U.S.C. 53701(8). Thus, NMFS anticipates that the balance of annual direct loan authority—currently \$41 million—may be available to finance or refinance the purchase of harvesting rights in federally managed fisheries under a limited access system. This action will allow NMFS to fully use the program's loan authority

either for historical purposes or for any authorized new purposes should it be determined that demand or lack of demand in either area would result in unused loan authority.

Response to Comments

NMFS received eight comments during the comment period. Two of these comments were not directly responsive to the rule. One of these included statements asserting general regulatory overreach and shortcomings of the regulatory process. The other comment was directed at overall agency policies regarding aquaculture. A rule on financing harvesting rights is not the appropriate venue for comments on national regulatory or other general policies.

The remaining six comments were either supportive of the new authority, or neutral. Of these, three mentioned support for allowing FMCs to comment on potential lending for harvesting rights in their respective fisheries. Two supported retaining protections for the traditional uses of the loan program and reserving the current funding level (\$59 million) for such uses, taking into account annual demand for the loan authority. One also supported not applying additional loan program limitations to the new harvesting rights lending authority.

Specific points raised in comments included: requesting further guidance on what constitutes acceptable objections from FMCs for not allowing financing of harvesting rights in fisheries under their jurisdictions; assuring that traditional uses of the FFP loan program are protected; and not limiting the new harvesting rights authority or restricting lending to fisheries or borrowers outside of the fisheries in the existing IFQ loan programs.

Adaptive Program Management – One commenter suggested that NOAA should apply adaptive program management controls to allow lending in excess of \$59 million in years where demand for traditional loan uses is high, and in years when historic usage is lower, NOAA could

allow lending in excess of the \$41 million for harvesting rights.

Response – NOAA concurs, and is planning to institute such flexibility.

FMC Comments on Harvesting Rights Loans – Two commenters supported the provision allowing FMCs to provide input on the potential effects of harvesting rights loans on fisheries under their jurisdiction. One commenter suggested that while FMCs may have fisheries expertise, they may not have similar financial expertise that would help them predict potential effects of a loan program for fisheries under their jurisdiction. The commenter suggested that NMFS provide additional guidance as what constitutes an acceptable objection from a FMC that would justify a veto of a new loan program in a particular fishery.

Response – First, to clarify for the commenter, the regulations give FMCs an opportunity to comment but do not give them veto power. The ultimate decision on any harvesting rights loan will be made by NMFS. NMFS considered whether to attempt to provide additional guidance as to what would constitute an acceptable objection from a FMC, but concluded that additional guidance is not possible or necessary at this time. Each FMP has its own goals and objectives, and each fishery has its own unique scientific and financial circumstances, and therefore, attempting to provide additional, practical general guidance for all fisheries is not feasible. NMFS will carefully consider any input it receives from a FMC as to why the FMC believes the availability of financing for harvesting rights in a fishery would harm the achievement of the goals and objectives of the FMP applicable to the fishery, and NMFS will reach a reasoned decision after considering all of the relevant information regarding the fishery.

Historical Loan Purposes – Two commenters encouraged NMFS to protect the historical loan purposes in the implementation of the harvesting rights rule, by reserving \$59 million of loan

authority for loans for those historical purposes and using the current balance of \$41 million in loan authority for loans for harvesting rights. An additional commenter similarly requested that the final rule not cause a redistribution away from, or additional limitations on, lending for historical uses in the Northwest Halibut/Sablefish Loan Program.

Response - NMFS generally agrees with these comments. As explained in the proposed rule, Section 302 of the Coast Guard Authorization Act of 2015 imposes no limitations on the extent of financing to be provided by the FFP for the purchase of harvesting rights. However, it does require that the Secretary make a minimum of \$59 million available each fiscal year for historical uses, as defined at 46 U.S.C. 53701(8). 46 U.S.C. 53702(b)(3). NMFS anticipates that the balance of annual direct loan authority—currently \$41 million—may be available to finance or refinance the purchase of harvesting rights in federally managed fisheries under a limited access system. This action will allow NMFS to fully use the program’s loan authority either for historical purposes or for any authorized new purposes should it be determined that demand or lack of demand in either area would result in unused loan authority. The loan program currently operates on a “first come, first served” basis. The loan projects that are proposed with complete documentation and commitment fee earliest, are the first approved. However, for the harvesting rights program, \$41 million will be reserved for harvesting rights loans until later in the lending year, to facilitate the receipt and processing of harvesting rights proposals. NMFS understands that early in the program’s implementation it may take more time to complete harvesting rights loan approvals, and loan scheduling should support that. However, in keeping with the direction in the Coast Guard Authorization Act of 2015, NMFS will generally reserve \$59 million for traditional loans until later in the lending year, prior to obligating the funds to loans for harvesting

rights.

Limitations in IFQ Loan Programs – One comment letter noted that IFQ loan programs contain certain restrictive provisions, relating to entry-level and small vessel fishermen, that were not included in the statute or proposed rule for the harvesting rights program, and suggested that participants, specifically including crew, in these existing IFQ loan fisheries (Northwest Halibut/Sablefish and Bering Sea and Aleutian Islands Crab) be allowed to obtain loans under the harvesting rights authority.

Response – NMFS agrees. We note that the Coast Guard Authorization Act of 2015 does not establish ownership limitations or include the same limitations that apply to the IFQ lending programs, and it places no restriction on the application of this new authority to any federally-managed limited access fisheries. Furthermore, Section 302 of the Coast Guard Authorization Act of 2015 says the new lending authority is “[i]n addition to the other eligible purposes and uses of direct loan obligations provided for in” 46 U.S.C. Chapter 537, which includes the authority for the IFQ lending programs in 46 U.S.C. 53706, meaning the new authority is intended to operate in addition to the IFQ lending authority. 46 U.S.C. 53702. Therefore, NMFS will consider applications from all fishers and owners of harvesting rights, including those who presently participate in the existing IFQ loan fisheries or participate (or would participate except for certain limitations) in the IFQ loan programs. As provided for in the new regulations, NMFS will accept and consider any input the North Pacific Fishery Management Council might have regarding the availability of the new harvesting rights loans in the existing IFQ loan fisheries. The existing IFQ loan fisheries (Northwest Halibut/Sablefish and Bering Sea and Aleutian Islands Crab) programs will also continue as provided by 50 CFR 253.28 and 50 CFR 253.30, respectively.

Fostering smaller-scale and entry-level fishers – One commenter urged NOAA to continue fostering the growth and success of smaller-scale and entry-level fishing communities, as is the case under the current IFQ loan programs, and to prioritize sustainable fish farmers and wild-caught fishing communities when selecting beneficiaries of its grants and aid programs.

Response – While this rule does not affect grant programs, NMFS will continue to follow its statutory and regulatory obligations with respect to the FFP, and will continue to provide loans to applicants who meet all of the statutory and regulatory requirements of the FFP, including loans for smaller-scale and entry-level fishers under the current IFQ loan programs.

Harvesting Rights Lending

Lending for harvesting rights will follow existing FFP lending procedures and guidelines. Borrowers must be U.S. citizens or entities eligible to document a vessel for coastwise trade under 46 U.S.C. 50501, meet all general FFP requirements, and meet all requirements to hold the harvesting rights under the applicable FMP at the time of loan closing. The FFP may require additional lending conditions and security terms such as loan guarantees or security interests in other collateral to bring credit risk to acceptable levels. Affiliated businesses, the borrower's principals or majority shareholders, persons or entities with a financial interest in the borrower, or any individuals holding community property rights may also be required to provide a guaranty.

In addition, all loan applicants are subject to background and credit investigations, which may include, but are not limited to, reviews for unresolved fishing violations, criminal background checks, delinquent debt investigations, and credit reports. Like other FFP loan programs, lending for harvesting rights is subject to a statutory loan limit of up to 80 percent of the actual cost of the transaction, set as the purchase price or, in the case of refinancing, the

current market value. The FFP retains sole discretion to determine the transaction's actual cost or current market value.

Harvesting rights loan amounts can carry up to a 25-year term and can be used to either purchase new rights or refinance the debt associated with the prior purchase(s) of harvesting rights. In addition to maintaining a 20 percent minimum equity stake, borrowers refinancing existing debt will only receive the lesser of the outstanding amount of debt to be refinanced or 80 percent of the current market value of the harvesting right.

If a borrower seeking refinancing fails to have the requisite 20 percent equity stake (measured as the difference between the current market value of the primary collateral and the amount of the loan), that borrower will need to pay down debt to meet the required level. In addition, under FFP standards, borrowers are only eligible for refinancing if their initial purchase would have been eligible for financing. The program will refinance harvesting rights acquired prior to this regulation if the buyer's original purchase would have been eligible for FFP financing under the terms of this action.

Prospective borrowers may apply for a loan through any of the NOAA Fisheries Service regional FFP offices (St. Petersburg, FL; Gloucester, MA; Seattle, WA). They must pay the appropriate application fee, set by 46 U.S.C. 53713(b) as one-half of one percent of the loan amount requested, which is made up of two parts. Half is the "filing fee," and is nonrefundable when the FFP officially accepts the application. The other half, known as the "commitment fee," becomes nonrefundable when the FFP executes and mails an Approval-in-Principle (AIP) letter to the applicant. The FFP may refund the commitment fee if the FFP declines the application or the application is withdrawn prior to the issuance of an AIP letter.

Summary and Explanation of Regulatory Changes

NMFS did not make any changes from the proposed to final regulations in response to public comments. This action adds the following section, as explained here.

Harvesting Rights Loans (253.31)

This new section provides regulatory provisions specific to the harvesting rights loans. At the time a borrower submits an application, he or she must satisfy the criteria listed in this new section in order to be eligible to receive financing under the program. The borrower must comply with any limitations on the quantity of harvesting rights that may be owned by one holder, as specified in the applicable FMP and implementing regulations. The FFP will not finance harvesting rights in excess of FMP-imposed ownership limitations. However, the FFP may finance harvesting rights in the existing IFQ loan program fisheries in excess of the ownership limitations in the current IFQ loan program regulations, though the FFP would accept comments on that from the applicable FMC, if the FMC chooses to comment.

Classification

This final rule is published under the authority of, and is consistent with, Chapter 537 of Title 46 of the United States Code and the Magnuson-Stevens Act, as amended. The NMFS Assistant Administrator has determined that this final rule is consistent with Chapter 537 of Title 46 of the U.S. Code, the Magnuson-Stevens Act, as amended, and other applicable law.

NEPA

NMFS has determined that this rule qualifies to be categorically excluded from further NEPA review. This action is consistent with categories of activities identified in CE G7 of the Companion Manual for NOAA Administrative Order 216-6A, and we have not identified any

extraordinary circumstances that would preclude this categorical exclusion.

Executive Order 12866

This final rule has been determined to be not significant for purposes of Executive Order 12866.

This final rule does not duplicate, overlap, or conflict with any other relevant Federal rules.

Paperwork Reduction Act

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

This final rule contains collections-of-information subject to the PRA, which have been approved by OMB under control number 0648-0012. The application requirements contained in these rules have been approved under OMB control number 0648-0012. Public reporting burden for placing an application for FFP financing is estimated to average eight hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. No comments were received regarding the paperwork aspects of this rule.

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this rule will not have a significant economic impact on a substantial number of small entities.

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.*, requires that, whenever an agency is required by 5 U.S.C. 553, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. 5 U.S.C. 603(a). However, where an agency can certify “that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities” then an agency need not undertake a full regulatory flexibility analysis. 5 U.S.C. 605(b).

Participation in the FFP is entirely voluntary. This action imposes no mandatory requirements on any business. This rule will implement programs authorized by law. Specifically, the rule enacts regulatory additions to create a new lending purpose authorized by Section 302 of the Coast Guard Authorization Act of 2015 (Pub. L. 114-120) and will be implemented in accordance with 50 CFR part 253, subpart B. This action creates new § 253.31.

As defined by NMFS for RFA purposes, this rule may affect small fishing entities that have annual revenues of \$11.0 million or less, including, but not limited to, vessel owners, vessel operators, individual fishermen, small corporations, and others engaged in commercial fishing activities regulated by NOAA. Borrowers under this authority may also include large businesses. Notably, because the FFP is a voluntary program that provides loans to qualified borrowers, non-borrowers—large or small—would not be regulated by this rule.

Although the FFP requires certain supporting documentation during the life of a loan, the requirements do not impose unusual burdens when compared to the burdens imposed by other

lenders. Moreover, because the basic need for financing would continue to exist without the FFP, the individuals seeking financing would still need to comply with similar, if not identical, requirements imposed by another lender. Records required to participate in the FFP are usually within the normal records already maintained by fishermen. It should take fewer than eight hours per application to meet these requirements.

The information required from borrowers, such as income tax returns, insurance policies, permits, licenses, etc., is already available to them. Depending on circumstances, the FFP may require other supporting documents, including financial statements, property descriptions, and other documents that can be acquired at reasonable cost if they are not already available.

FFP lending is a source of long-term, fixed rate capital financing and imposes no regulatory requirements on anyone other than those applying for loans. FFP borrowers make a voluntary decision to use the available lending.

These loan programs will only have positive impacts on borrowers. Because participation is voluntary and requires effort and the outlay of an application fee, borrowers for harvesting rights financing are assumed to have made a determination that using FFP financing provides a benefit, such that the FFP's long-term, fixed rate financing provides only a positive economic impact. Importantly, the FFP does not regulate or manage the affairs of its borrowers, and the regulations impose no additional compliance, operating or other fees or costs on small entities other than a financing relationship would require.

As a result of this certification, an initial regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 253

Aquaculture, Community development groups, Direct lending, Financial assistance, Fisheries, Fishing, Individual fishing quota, Harvesting rights (privileges).

Dated: May 21, 2018.

Samuel D. Rauch III,
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons set forth in the preamble, NMFS amends 50 CFR part 253, subpart B, as follows:

PART 253—FISHERIES ASSISTANCE PROGRAMS

1. The authority citation for part 253 continues to read as follows:

Authority: 46 U.S.C. 53701 and 16 U.S.C. 4101 *et seq.*

Subpart B—Fisheries Finance Program

2. Section 253.31 is added to read as follows:

§ 253.31 Harvesting rights loans.

(a) *Specific definitions.* For the purposes of this section, the following definitions apply:

(1) *Harvesting right(s)* means any privilege to harvest fish in a fishery that is federally managed under a limited access system.

(2) *Limited access system* has the same meaning given to that term in section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802).

(b) *Loan requirements and limitations.* These loan requirements and limitations apply to individuals or entities who seek to finance or refinance the acquisition of harvesting rights.

(1) The borrower must meet all regulatory and statutory requirements to hold the harvesting rights at the time any such loan or refinancing loan would close.

(2) NMFS will accept and consider the input of a Regional Fishery Management Council at any time regarding the availability of loans in a fishery under the Council's authority.

(i) The Council may submit an explanation to NMFS, in writing, as to why the availability of financing for harvesting rights in a fishery would harm the achievement of the goals and objectives of the Fishery Management Plan applicable to the fishery. If NMFS accepts the Council's reasoning, harvesting rights loans will not be provided, or will cease to be provided, in that fishery.

(ii) If NMFS determines that harvesting rights loans will not be provided in a fishery, NMFS will publish a notice in the Federal Register notifying the public that new loans will not be made in that fishery.

(iii) In such a scenario, pending applications will be returned and loan fees returned as exceptional circumstances justify the action.

(3) The harvesting rights to be financed must be issued in a manner in which they can be individually identified such that a valid and specific security interest can be recorded. This determination shall be solely made by the Program.

(c) *Refinancing.* (1) The Program may refinance any existing debts associated with harvesting rights a borrower currently holds, provided that:

(i) The harvesting rights being refinanced would have been eligible for Program financing at the time the borrower purchased them, if Program financing had been available;

(ii) The borrower meets all other applicable lending requirements; and

(iii) The refinancing is in an amount up to 80 percent of the harvesting rights' current market value, as determined at the sole discretion of the Program, and subject to the limitation that the Program will not disburse any amount that exceeds the outstanding principal balance, plus accrued interest (if any), of the existing harvesting rights' debt being refinanced or its fair market value, whichever is less.

(2) In the event that the current market value of harvesting rights and principal loan balance do not meet the 80 percent requirement in paragraph (c)(1)(iii) of this section, borrowers seeking refinancing may be required to provide additional down payment.

(d) *Maturity.* Loan maturity may not exceed 25 years, but may be shorter depending on credit and other considerations.

(e) *Repayment.* Repayment will be by equal quarterly installments of principal and interest.

(f) *Security.* Although harvesting right(s) will be the primary collateral for a loan, the Program may require additional security pledges to maintain the priority of the Program's security interest. The Program, at its option, may also require all parties with significant ownership interests to personally guarantee loan repayment for any borrower that is a corporation, partnership, or other entity, including collateral to secure the guarantees. Some projects may

require additional security, collateral, or credit enhancement as determined, in the sole discretion, by the Program.

(g) *Program credit standards.* Harvesting rights loans, regardless of purpose, are subject to all Program general credit standards and requirements. Collateral, guarantee and other requirements may be adjusted to individual credit risks.

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